TEH CHOCK SOON v. LOVELACE AND HASTINGS.

[App. Civil Juris. (Willan, C.J.) February 24, 1947]

Leases and Tenancies (War Absentees) Adjustment Ordinance, 1946 Section 9—Rules regulating procedure before the Leases and Tenancies (War Absentees) Board—Whether Board can decide by a majority—Order of ejectment of the Board must incorporate the amount which a pre-occupation tenant must pay to the new tenant as compensation for ejectment and improvements.

In this case the appellant appealed against the order of the Leases and Tenancies (War Absentees) Board, Kuala Lumpur, which had by a majority of two to one made the following order on the 7th December 1946:—"On the application of Messrs. Lovelace and Hastings for possession of premises No. 62 Klyne Street, and upon hearing the parties the Board orders that the 2nd and 3rd respondents do give up vacant possession on or before 28th February 1947."

The grounds of appeal were as follows:—

(1) that the Board was wrong in not granting an application for an adjournment, particularly in view of the provisions of Rule 8 of the Rules regulating the procedure before the Board at Kuala Lumpur;

(2) that the Order of the Board is invalid because, by Section 9 (2) of the Ordinance, the Board must incorporate in any such order the amount which a pre-occupation tenant must pay to a new tenant as compensation for ejectment and improvements;

(3) that the Order of the Board, being by a majority, is invalid because it is not an order of the whole Board.

Held, (1) that Rule 9 of the Rules regulating the procedure before the Leases and Tenancies (War Absentees) Board deals with two special types of applications which the Board may reject at the first hearing on the grounds set out in the Rule, but such Rule does not in any way fetter the powers of the Board to hear and determine any other application at the first hearing;

(2) that the order of the Board was defective as there was nothing on the record to show that the Board considered the question of compensation to the new tenant for ejectment and improvements and that the appellant must succeed on this ground of appeal.

(3) that where no express provision is made on the subject of voting, the decision of the majority of the members of the Board present and voting, is a decision of the Board.

Case referred to :—

(1) *Attorney-General v. Davy* 26 E.R. 531.

APPEAL from the decision of the Leases and Tenancies (War Absentees) Adjustment Board, Kuala Lumpur.

Appellant in person.

Marjoribanks for the respondent.

Willan, C. J. :—In this case the respondent firm, as pre-occupation tenants of the premises known as No. 62, Klyne Street, Kuala Lumpur, applied to the Leases and Tenancies (War Abentees) Board appointed for the urban area of Kuala Lumpur (hereinafter in this judgment referred to as "the Board"), for an order that they be put in possession of the said premises as monthly tenants and that the appellant, as a new tenant, i.e. a tenant holding under a tenancy granted after the enemy occupation date, and also his sub-tenant, should quit and give vacant possession on the 31st January, 1947.

The proceedings before the Board are governed by the provisions of the Leases and Tenancies (War Absentees) Adjustment Ordinance 1946, and the application of the respondent firm was filed with the Board on or about the 21st day of November, 1946. Notice was given to all the parties concerned to attend the hearing before the Board on the 30th day of November, 1946, and it is common ground that the hearing was postponed and took place on the 7th day of December, 1946.

At that hearing Mr. Marjoribanks, a partner of the respondent firm, gave evidence and proved that his firm were the pre-occupation tenants of the premises. The appellant and his sub-tenant were both represented by counsel before the Board. After Mr. Marjoribanks had given evidence before the Board, counsel for the appellant applied for an adjournment alleging that the appellant had come to an amicable agreement with Mr. Marjoribanks, whereby the appellant was to remain in possession of the down-stairs part of the premises and the respondent firm should take possession of the upstairs portion. This was denied by Mr. Marjoribanks. The Board which consisted of three members refused the application for an adjournment, and thereupon counsel for the appellant withdrew from the proceedings. Counsel for the sub-tenant of the appellant took no part in the proceedings, except to request that his client should be permitted to remain on the premises until the month of February, 1947.

The landlord in the proceedings before the Board is described as the "Estate of Chan Say Peng". I presume that the trustee or trustees of that Estate were served with a notice of hearing of the application. The record says that the landlord did not attend the hearing.

After his counsel had withdrawn, the appellant gave evidence which merely referred to this alleged verbal agreement between himself and Mr. Majoribanks. In reply to a question by the Board the appellant said that he had not brought his witnesses, because he expected that the case would be postponed.

By a majority of two to one the Board refused the application for an adjournment and made the following order on the 7th day of December, 1946 :—

On the application of Messrs. Lovelace and Hastings for possession of premises No. 62 Klyne Street, and upon hearing the parties the Board orders that the 2nd and 3rd respondents do give up vacant possession on or before 28th February 1947.

The third member of the Board considered that the appellant should have been granted an adjournment in order to file his defence and, although this is not specifically stated on the record, to call his witnesses.

The appellant has appealed against the order of the Board. The order was made, or purported to be made, under section 9 (2) of the Ordinance. Under section 9 (4) an appeal lies to this Court from an order of the Board made under section 9 (2) whether it be on a point of law or fact. Shortly the grounds of appeal are as follows :—

1. That the Board was wrong in not granting the appellant's application for an adjournment, particularly in view of the provisions of Rule 9 of the Rules regulating the procedure before the Board at Kuala Lumpur. These Rules are contained in Gazette Notification No. 3652 in the Malayan Union Gazette of the 5th day of December, 1946.
2. That the order of the Board is invalid because, by section 9 (2) of the Ordinance, the Board must incorporate in any such order the amount which a pre-occupation tenant must pay to a new tenant as compensation for ejectment and improvements. This was not included in the written grounds of appeal, but was taken at the hearing of the appeal.
3. That the order of the Board, being by a majority, is invalid because it is not an order of the whole Board.

Taking the last ground of appeal first, it is clear from decided cases that, where no express provision is made on the subject of voting, the decision of the majority of the members of a Board, present and voting, is a decision of the Board. The case of the *Attorney-General v. Davy*[1] is an authority for this proposition. In this case the Board consisted of three members, which fulfils the requirements of section 4 (2) of the Ordinance, and therefore this ground of appeal fails.

As regards the second ground of appeal, there is nothing on the record to show that the Board considered the question of compensation to the new tenant for ejectment and improvements. It was admitted on the hearing of this appeal by Mr. Marjoribanks that the order of the Board is defective on this account. Accordingly, the appellant must succeed on this second ground of appeal.

With regard to the first ground of appeal, the contention of the appellant that Rule 9 of the Rules cited above applies to this case is erroneous. Rule 9 is as follows :—

The Board shall have the right in its discretion to dispose of an application at the first hearing if the application discloses no proper grounds for the application or if it discloses a claim for relief which the Board has not jurisdiction to grant.

The appellant's contention, as I understand it, is that only applications coming within the scope and purview of that Rule can be dealt with at the first hearing. This is not the meaning nor the intention of Rule 9. That Rule deals with two special types of applications which the Board may reject at the first hearing on the grounds set out in that Rule, but such Rule does not in any way fetter the powers of the Board to hear and determine any other application at the first hearing.

If the appellant had not succeeded on his second ground of appeal, I should have been reluctant to have allowed him further time in which to call witnesses before the Board. It was his own fault that his witnesses were not before the Board, and parties to proceedings before the Board are not entitled to make no effort to call their witnesses and then use the fact that their witnesses are absent as a ground for an application for an adjournment.

But, since this case must be sent back to the Board to take evidence in order to assess what compensation, if any, should be paid by the Respondent firm to the appellant under section 9 (2) of the Ordinance, I feel that no injustice will be done to the respondent firm by permitting the appellant to call at that further hearing the witnesses he failed to call at the hearing on the 7th day of December, 1946.

Accordingly, the order of the Board of the 7th day of December, 1946, is set aside and the case remitted back to the Board for further hearing at which

(a) The evidence of the appellant's witnesses shall be taken on the main issue i.e. the issue whether the Board should grant an order of ejectment after hearing such witnesses, and
(b) The Board should take evidence on the question of compensation, if they decide to make an order of ejectment.

If, after the conclusion of that further hearing, the Board decides to grant an ejecment order, that order should state what compensation, if any, is to be paid by the respondent firm to the appellant under section 9 (2) of the Ordinance.

Although the appellant has suceeded in this appeal, I make no order as to costs on this appeal, since he

has succeeded principally on account of the order of the Board of the 7th day of December 1946 being defective.

Appeal Allowed.

FOON SEONG v. CHAN SAN CHOON (f).

[Orig. Civil Juris. (Bostock-Hill, J.) February 17, 1947]

Civil Procedure Code, Section 467 (i)—Originating Summons—Plaintiff really asking for a decision that there is a valid trust by a deceased person in his favour —Originating Summons is not the appropriate form of procedure in such a matter—Summons served on widow of deceased although Letters of Administration had not been issued to her—Originating Summons not maintainable.

The plaintiff took out an Originating Summons to obtain an order for the transfer to himself of certain Omnibus Company shares standing in the name of one Foong Onn Kwan (deceased). The plaintiff alleged that those shares were bought by him and were held in trust for him by the said Foong Onn Kwan. The Originating Summons was served on the defendant, the widow of the said Foong Onn Kwan. It appeared that the Grant of Letters of Administration of the estate of the said Foong Onn Kwan had not yet been issued to her, but she had applied for such grant. At the hearing of the Summons Counsel for the plaintiff stated that the basis of his application was the alleged trust deed referred to in the affidavits filed in support of the plaintiff's application and that plaintiff was a cestui que trust under that deed. He also asked for a postponement until the grant of Letters of Administration should actually have been issued to the defendant. Counsel for the defendant took two main objections, firstly as to the procedure by way of Originating Summons under Section 467 (i) of the Civil Procedure Code, and secondly, that serving the defendant before she had extracted Letters of Administration was wrong in law.

Held, (1) that as what the plaintiff was really asking for was a decision as to whether there was a valid trust by the deceased in his favour, the procedure by way of Originating Summons under Section 467 (i) of the Civil Procedure Code was not an appropriate form of procedure in this case; and

(2) that an Administrator cannot be sued in respect of a debt due from a deceased person, until Letters of Administration have been granted under seal, and therefore that even if the plaintiff were allowed to amend his Originating Summons by suing the defendant as administrator of the estate of Foong Onn Kwan, his Originating Summons would still not be maintainable.

Case referred to :—

(1) *Chia Teck Liang v. Tan Soo Khiang* (1936) 5 M.L.J 185.

ORIGINATING SUMMONS.

K. MacDuff for the Plaintiff.

M. S. Mahendran for the Defendant.

Bostock Hill, J. :—In this application the Plaintiff is seeking in an Originating Summons to obtain an order for the transfer to himself of certain Omnibus Company shares standing in the name of one Foong Onn Kwan (now deceased). The Plaintiff alleges that these shares were bought by him and were held in trust for him by the said Foong Onn Kwan.

The Defendant is one Chan Sau Choon (f) and, although her name appears in the Originating Summons as Defendant, no other mention of her is made in the Affidavits filed by the Plaintiff. She was, however, served, and she has filed an affidavit in reply and in that affidavit she states that she is the widow of the said Foong Onn Kwan deceased and that the Grant of Administration of the estate of the said Foong Onn Kwan has not yet been issued to her. In the course of argument by Counsel it appeared that she has applied for such grant.

The heading of the Originating Summons is as follows :—

> In the matter of certain shares in Lintang Jalong Omnibus Company Limited and in Reliance Omnibus Company Limited standing in the name of Foong Onn Kwan
>
> and
>
> In the matter of Section 467 (i) of the Civil Procedure Code.

Mr. MacDuff for the Plaintiff stated that the basis of his application was the alleged Trust Deed referred to in the affidavits filed in support of Plaintiff's application, and that Plaintiff was a *cestui que* trust under that deed. He argued that as such, he was entitled to use the procedure set out in Section 467 (i) of the Civil Procedure Code. He also stated that it would be more convenient to have the Originating Summons adjourned into Court and asked for a postponement until the Grant of Letters of Administration should actually have been issued to the Defendant.

Mr. Mahendran, for the Defendant, took 2 main objections, firstly, as to the procedure under Section 467 (i), and secondly, that serving the Defendant before she had extracted Letters of Administration was wrong in law. It is to be noted that the Defendant is named in the Originating Summons merely in her personal capacity but Mr. MacDuff had to concede in argument that he really wanted her in the Originating Summons in the capacity of legal representative of Foong Onn Kwan deceased.

Dealing first with the second objection, Mr. Mahendran cited *Chia Teck Liang v. Tan Soo Khiang*[1]. In that case it was decided that an Administrator cannot be sued in respect of a debt due to a deceased person, until Letters of Administration have been granted under seal. Hence, even if Plaintiff were allowed to amend his Originating Summons by suing the Defendant as Administrator of the Estate